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# In the Supreme Court of the United States

**OCTOBER TERM, 1988**

ORKIN EXTERMINATING COMPANY, INC.,
*Petitioner,*

vs.

FEDERAL TRADE COMMISSION,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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## QUESTION PRESENTED

Does Section 5(a) of the Federal Trade Commission Act empower the Commission to find that a simple breach of a consumer form contract is an "unfair" act or practice even though (a) there was no intent to cause consumer injury, (b) there was no deceptive or fraudulent conduct, and (c) the action complained of was taken in good faith reliance upon the advice of counsel?

## RULE 28.1 LIST

Rollins, Inc. is the parent company of petitioner Orkin Exterminating Company, Inc. Dettelbach Pesticide Corporation, Kinro Advertising Company, and Orkin S. A. de C. V. are subsidiaries of Orkin Exterminating Company, Inc.

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*Petitioner,*

vs.

FEDERAL TRADE COMMISSION,
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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner Orkin Exterminating Company, Inc. ("Orkin") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

## OPINIONS BELOW

The Final Order of the Federal Trade Commission, which includes the Initial Decision of the Administrative Law Judge, is reported at 108 F.T.C. 263 (1986) and reprinted as Appendix A. The corrected opinion of the United States Court of Appeals for the Eleventh Circuit affirming the Final Order is reported at 849 F.2d 1354 (11th Cir. 1988) and reprinted as Appendix B.

## JURISDICTION

The corrected judgment of the court of appeals was entered on July 15, 1988. A timely Suggestion for Rehearing In Banc was denied on September 19, 1988, in an order that is reprinted as Appendix C. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1985).

## STATUTE INVOLVED

Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a) (1985), is set forth in pertinent part in Appendix D.

## STATEMENT OF THE CASE

### 1. Statement of Facts

Orkin is a national pest control and exterminating company. 108 F.T.C. at 342. This litigation involves form contracts that it used for its termite and moisture control services between January 1966 and February 1975 (the "pre-1975 contracts").

The pre-1975 contracts provide for an initial treatment of covered property for a specified price and guaranteed protection thereafter, through inspections and retreatment or repair, for an annual renewal fee. *Id.* at 343-44. The customer has a guaranteed right to renew the termite or moisture protection each year for the lifetime of the treated structure without ever paying another treatment fee, and this guaranty may be assumed by later owners. *Id.* at 277.

The pre-1975 contracts state that they are automatically terminated in the event of a structural modification unless the customer permits Orkin to reinspect the premises, undertake additional treatment, and/or adjust the annual renewal fees. The contracts are silent as to whether the annual renewal fees can be increased under other circumstances. *Id.* at 344.

In late 1978, Orkin began to consider raising the renewal fees of all its termite and moisture control contracts in response to dramatic and unanticipated inflation in the cost of providing these services. *Id.* at 345. Orkin was advised by independent outside counsel that the pre-1975 contracts were renewable for an indefinite duration and hence could be terminated by Orkin with notice after a reasonable period of time. *Id.* at 346.

Relying in good faith on this opinion and the separate concurring opinion of the general counsel of its parent company, Rollins, Inc., in 1980 Orkin increased the annual fees on the pre-1975 contracts by 40% or up to $25.00, whichever was greater. *Id.* at 347. The average increase was $10.84, which raised the average annual fee to $34.37. By comparison, Orkin's average cost of providing termite renewal services had risen to $20.22 per account in 1980, largely due to an over 300% increase in the cost of the primary chemicals since 1967, and by 1984 its average termite renewal cost was up to $37.28 per account. R219. There has been no other increase in the renewal fees on the pre-1975 contracts. 108 F.T.C. at 349.

Notice of the increase was sent to approximately 207,000 holders of pre-1975 contracts (the "pre-1975 customers"). *Id.* at 347. According to Orkin's records, as of May 1981 it had received complaints about the increase

from less than 2% of the affected customers. *Id.* at 284. The annual cancellation rate on Orkin's pre-1975 contracts following the 1980 increase was only around 5%, whereas in 1980 it had experienced annual cancellation rates of 5.8% on all termite contracts and 5.2% on contracts that were in force for over five years. *Id.* at 292, 310. A number of pre-1975 customers testified that they did not believe at the time they contracted with Orkin that their contracts provided for a fixed annual renewal fee. *See, e.g.*, R245-247 ¶¶ 8, 9; R248-250 ¶¶ 8-10; R251-253 ¶¶ 8-10; R254-257 ¶¶ 8-10; R258-261 ¶¶ 8-10.

For approximately six months in 1968, Orkin used an advertising program for its termite control contracts called "Orkin 12." 108 F.T.C. at 345. This promotion included a pamphlet stating that the annual renewal fee *"is very modest and never increases."* *Id.* (emphasis in original). In light of the "Orkin 12" program, Orkin rescinded the 1980 increase in annual renewal fees of all pre-1975 customers who entered into their contracts at any time in 1968, whether or not they ever saw or heard of the foregoing pamphlet or statement, and gave these customers full credit for increased amounts already paid. *Id.* at 348-49.

In addition, Orkin rolled back the annual renewal fees of all other pre-1975 customers who objected to the 1980 increase on the ground that, at the time they contracted with Orkin, they thought that their annual renewal fee would not increase. *Id.* This "accommodation program" was developed and implemented by Orkin within months of its first notices to pre-1975 customers of the increased annual renewal fees, and by August 1984 some 5,700 pre-1975 customers had taken full advantage of it. *Id.* at 349.

## 2. Proceedings Below

In May 1984 the Federal Trade Commission (the "Commission") issued an Administrative Complaint charging Orkin with committing an "unfair act or practice" in violation of Section 5(a) of the Federal Trade Commission Act (the "FTCA") by raising the renewal fees on the pre-1975 contracts. The Commission did not contend that this alleged breach of contract involved either fraud or deception.

Complaint Counsel moved for summary judgment, arguing that the fee increase breached the pre-1975 contracts and violated Section 5(a) as a matter of law. Orkin cross-moved for summary judgment on the ground that the alleged breach of contract, even if proven, was not actionable under Section 5(a). Orkin also opposed Complaint Counsel's motion because there were disputed issues of material fact and application of fact to law that precluded summary judgment in favor of Complaint Counsel.

The administrative law judge entered summary judgment against Orkin as to the whole case. The Commission affirmed this Initial Decision in a Final Order (the "Final Order") which, *inter alia*, prohibited Orkin from charging or collecting the amount of the fee increase from customers still holding pre-1975 contracts.[1]

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1. Section 3.24(a)(2) of the Commission's Rules of Practice, which governs summary judgment in this proceeding, is based on Federal Rule of Civil Procedure 56, and cases interpreting Rule 56 are "controlling" as to its interpretation. *E.g., Hearst Corp.*, 80 F.T.C. 1011, 1014-15 (1972); *see also* 108 F.T.C. at 350 n.11. Thus, the Commission was required to assume that the evidence presented by Orkin is true, to give Orkin the benefit of all reasonable inferences that can be drawn from the evidence, and not to resolve any disputed issues of fact by weighing the evidence.

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Orkin appealed to the Eleventh Circuit, *see* 15 U.S.C. § 45(c) (1985), on two principal grounds. First, Orkin argued that there were material issues of fact for trial as to (i) whether it breached the pre-1975 contracts, and (ii) whether this alleged breach violated Section 5(a). Second, Orkin contended that the Commission's determination that a non-fraudulent, non-deceptive alleged breach of contract violated Section 5(a) exceeded the Commission's authority under both the FTCA and the Administrative Procedure Act. On April 19, 1988, the Eleventh Circuit issued its opinion affirming the Final Order in its entirety.

Orkin timely petitioned for rehearing or, alternatively, suggested rehearing *in banc*. The Commission also petitioned for rehearing of the denial of its motion for an injunction *pendente lite*. On July 15, 1988 the Eleventh Circuit issued a corrected opinion again upholding the Final Order in all respects and granting the Commission's motion for an injunction *pendente lite*.

Orkin timely renewed its previous Suggestion for Rehearing *In Banc*. The Eleventh Circuit denied this request in an Order issued September 19, 1988.

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Footnote continued—

*E.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 255 (1986); *Warrior Tombigbee Transp. Co. v. M/V Nan Fung*, 695 F.2d 1294, 1296-99 (11th Cir. 1983). Orkin submits that both the Commission and the Eleventh Circuit disregarded these fundamental summary judgment principles in finding that Orkin violated Section 5(a) as a matter of law on the record below.

## REASONS FOR GRANTING THE WRIT

**The Eleventh Circuit's "Unprecedented" Decision Exposes All Businesses Which Use Consumer Form Contracts to the Risk of Liability Under Section 5(a) of the FTCA for a Simple Breach of Those Contracts and Thereby Expands Section 5(a) Beyond the Scope Intended by Congress**

The Eleventh Circuit assumed that Orkin's decision to raise the annual renewal fees of the pre-1975 contracts was not deceptive or fraudulent; was not willful; and was not intended to cause consumer injury; and was arrived at in good faith upon the advice of counsel. 849 F.2d at 1359, 1368. Nonetheless, the court held that Orkin violated Section 5(a) of the FTCA as a matter of law. This result, which the Eleventh Circuit conceded "may be 'unprecedented,'" *id.* at 1368, is contrary to both the Commission's own stated position and any reasonable construction of Section 5(a). If allowed to stand, it would substantially federalize the interpretation and enforcement of all consumer form contracts in direct contravention of Congress' intentions in authorizing the Commission to remedy truly "unfair acts or practices."

As the Commission itself recognized in the Final Order, not every breach of contract is, or should be, actionable under Section 5(a). *See* 108 F.T.C. at 361 ("We need not and do not find that every breach of contract subjects the breaching party to liability under Section 5."). Additional circumstances must be proven to elevate an ordinary breach of contract into an unfair trade practice.

Orkin firmly believes, and argued to the Eleventh Circuit, that the Commission purported to find this "something more" in (i) Orkin's conduct and (ii) the Commission's three-pronged consumer injury test.[2] The Louisiana Court of Appeals has joined Orkin in this interpretation of the Final Order. *See Louisiana ex rel. Guste v. Orkin Exterminating Co.*, 528 So.2d 198, 202 (La. Ct. App. 1988). Nevertheless, the Eleventh Circuit held that the Commission's repeated emphasis on Orkin's conduct in the Final Order was effectively dicta, and that the Commission relied solely on its consumer injury test to distinguish Orkin's alleged breach of contract from "garden variety" breaches that are not within the ambit of Section 5(a). *See* 849 F.2d at 1366-67.

If the Commission sought to draw this "line" only with its consumer injury test, which Orkin denies, it totally failed. In practice, virtually every breach of a consumer form contract will satisfy all three prongs of the test. Because form contracts are used in multiple transactions, breach of a consumer form contract would almost always cause *substantial injury* in the aggregate, which is the measure applied by the Commission and approved by the Eleventh Circuit. Nor is it likely that the Commission will ever find any *countervailing benefits* to consumers or competitors from any breach of a

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2. The Commission defines its "consumer unfairness jurisdiction" in terms of a tripartite test of unjustified consumer injury: "It must be substantial; it must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and it must be an injury that consumers themselves could not reasonably have avoided." Letter from Federal Trade Commission to Senators Ford and Danforth (Dec. 17, 1980), *reprinted in* H.R. Rep. No. 156, Pt. 1, 98th Cong., 1st Sess. 33-40 (1983), at 36. *See* 849 F.2d at 1364; *American Financial Services Ass'n v. FTC*, 767 F.2d 957, 971 (D.C. Cir. 1985), *cert. denied*, 475 U.S. 1101 (1986).

consumer form contract. And if, as in this case, the Commission closes its eyes to both uncontested record evidence and common sense proof of the availability of comparable products or services elsewhere, adequate state law remedies, and alternative dispute resolution programs offered by the affected company, no breach of a consumer form contract will ever be held to be *reasonably avoidable* by consumers.

The Commission's consumer injury test is therefore no test at all for identifying those breaches of consumer form contracts, if any, that are properly actionable under Section 5(a). Rather, every such breach risks investigation and intervention by the Commission in its unfettered discretion. This potential dragnet is squarely at odds with the Commission's own admission that "not every breach of contract subjects the breaching party to liability under Section 5." 108 F.T.C. at 361.

Further, no detailed review of the legislative history or case law of Section 5(a) is necessary to confirm that it was not enacted by Congress to confer a roving jurisdiction on the Commission to displace state contract law whenever consumer form contracts are involved. Yet the Eleventh Circuit's decision exposes all businesses which use consumer form contracts to the threat of prosecution by the Commission and severe penalties under federal law for any breach of these contracts even where, as here, there is no claim of fraud, deception, or intentional wrongdoing and the alleged breach was done in good faith reliance on the advice of counsel.[3]

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3. Once the Commission has issued a final cease and desist order against a person, partnership, or corporation for engaging

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Neither law nor logic justifies this far-reaching expansion of Section 5(a), especially when retroactively imposed on a single company instead of prospectively developed and applied across the board through a rule-making proceeding. *Cf. American Financial Services Ass'n v. FTC*, 767 F.2d 957 (D.C. Cir. 1985) (upholds exercise of the Commission's "unfairness" jurisdiction to promulgate rules regulating credit practices), *cert. denied*, 475 U.S. 1011 (1986). Orkin accordingly urges that this petition for a writ of certiorari be granted to review and reverse the Eleventh Circuit's improper and unwise decision on this important question of federal law that has not been, but should be, settled by this Court.

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Footnote continued—

in an "unfair act or practice" in violation of Section 5(a), it may seek additional relief against such entity in a separate "consumer redress" suit in federal or state court if "the act or practice to which the cease and desist order relates is one which a reasonable man would have known under the circumstances was dishonest or fraudulent." 15 U.S.C. § 57b(a)(2) (Supp. 1988). This relief can include, but is not limited to, rescission or reformation of contracts, refund of money or return of property, or payment of damages. *Id.* § 57b(b). Even though the Commission has never alleged, let alone tried to prove, that Orkin's actions in raising the annual renewal fees on the pre-1975 actions were in any way fraudulent or deceptive, the Commission still stated in its Notice of Contemplated Relief in this proceeding that it might seek consumer redress against Orkin "in the form of notice, repairs, restitution and/or refunds and such other types of relief as are set forth in [§ 57b(b)]." R184.

## CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari ought to be granted and the Eleventh Circuit's decision reversed and remanded with instructions that the Final Order be vacated and remanded to the Commission for further findings of fact and/or trial on the merits.

Respectfully submitted,

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